

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

JULY 5, 1995

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62(1), STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 94-3266

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

STATE OF WISCONSIN,

Plaintiff,

v.

**RANDY GIESE, d/b/a
MIDSTATE OIL,**

**Defendant-Third-Party Plaintiff-
Appellant-Cross-Respondent,**

v.

**PETROLEUM EQUIPMENT
SERVICE,**

**Third-Party Defendant-Respondent
Cross-Appellant.**

APPEAL and CROSS-APPEAL from a judgment of the circuit court for Oconto County: WILLIAM J. DUFFY, Judge. *Affirmed.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. Randy Giese, d/b/a Midstate Oil, fined by the State in excess of \$100,000 for violations of the solid waste disposal law, appeals a judgment dismissing his tort and contract claims against Petroleum Equipment Service (PES), from whom Giese obtained the residual contents of petroleum storage tanks. Giese's third-party action alleged a private cause of action to recoup the fine and for other damages based upon PES's alleged violations of the same statutory subchapter (subchapter IV, ch. 144, STATS., entitled "Solid Waste, Hazardous Waste and Refuse") that Giese violated, as well as claims based upon misrepresentation. Following a bench trial, the circuit court dismissed all of Giese's claims.

We agree with PES's contention that the statute relating to generation of hazardous waste upon which Giese bases his claim of negligence per se, § 144.63, STATS., does not create a private cause of action. Further, the trial court's finding of an absence of reliance on Giese's part regarding the nature of materials received from PES is not clearly erroneous. We therefore affirm the judgment dismissing Giese's third-party complaint.

Giese's complaint alleged PES's liability based upon negligence per se for its violation of § 144.63, STATS., relating to generation of hazardous waste, and three forms of fraudulent misrepresentation. Although Giese also alleged a breach of contract, he does not develop any argument concerning that claim on appeal. We deem that issue abandoned. See *Reiman Assocs. v. R/A Advertising, Inc.*, 102 Wis.2d 305, 306 n.1, 306 N.W.2d 292, 294 n.1 (Ct. App. 1981). Giese operated a bulk waste oil collection business and temporarily stored hundreds of thousands of gallons in numerous bulk tanks for later resale to asphalt plants to be used as fuel to make asphalt during the road building season. In 1991, Giese began taking drums of residual contents of petroleum storage tanks from tank cleaning/removal contractors, including PES. Giese approached the PES representative, Paul Berken, and arranged to pick up drums of petroleum waste for \$100 per drum. Because neither party knew that gasoline was characterized as a hazardous waste, Giese gave Berken blank nonhazardous waste manifest forms that he used in his other drum accounts and showed Berken how to complete them. Giese told Berken the contents of the drums would be blended with his waste oil for resale. Until March 1992, Giese knowingly picked up drums of fuel oil, diesel fuel, waste oil and gasoline from PES. In March 1992, the DNR inspected Giese's premises and advised Giese that he could not accept gasoline because it was a hazardous

waste. It required Giese to develop a sampling and analysis program to ensure compliance.

There was conflicting evidence whether Giese then called Berken to advise that he no longer could accept gasoline waste products. Giese testified he made the call while Berken denied any recollection of it, stating that had the conversation happened, "I would have remembered it. ... That conversation never happened." PES continued to provide Giese with drums that contained gasoline waste. PES continued to use the nonhazardous waste manifests Giese had provided him.

About a year later, on March 22, 1993, a DNR inspection disclosed hazardous waste (material with a flash point of 140 degrees Fahrenheit) in two of eight bulk tanks tested and in eight of twelve fifty-five-gallon drums tested on Giese's premises. Only one of the eight drums came from PES, and the tanks contained random storage from various and unidentifiable Giese accounts. The PES drum was returned and disposed of by PES. Giese stipulated with the DNR to a forfeiture and penalty assessments for hazardous waste violations exceeding \$100,000. He then brought this third-party action seeking to recoup the penalties as well as the costs of disposal of the contents of his tanks and drums. Other facts are set forth in the discussion of the misrepresentation claims.

NEGLIGENCE PER SE: VIOLATION OF STATUTE

Giese first alleges that PES incurs liability to him for PES' violations of the hazardous waste statute. Whether a statute creates a private cause of action is a matter of statutory interpretation presenting a question of law for this court without deference to the trial court. *In re Estate of Drab*, 143 Wis.2d 568, 570, 422 N.W.2d 144, 145 (Ct. App. 1988). For a statute or administrative rule to form a basis for civil liability, the legislature must express an intent that the law in question serve as a basis for such liability. *Fortier v. Flambeau Plastics Co.*, 164 Wis.2d 639, 658, 476 N.W.2d 593, 600 (Ct. App. 1991). *Fortier* concluded that violations of the approval process and licensing provisions of § 144.44, STATS., did not provide a private cause of action. The provision upon which Giese relies, § 144.63, STATS., relates to the generation of such solid and hazardous waste. This section and the statutes under discussion

in *Fortier* are both part of the same subchapter of ch. 144 entitled "Solid Waste, Hazardous Waste and Refuse." The rationale applied in *Fortier* to decide that the legislature did not intend to create a private cause of action applies here as well. Any violation of the hazardous waste statute in this case did not create a private cause of action.

MISREPRESENTATION: STRICT, INTENTIONAL AND NEGLIGENT

The trial court decided that Giese had failed to prove the element of reliance and dismissed his claims of fraudulent misrepresentation relating to the waste furnished by PES. In claims for misrepresentation, the plaintiff must show only that he believed the representation and relied upon it; it is not necessary that the representation be of such a character as would influence the conduct of a person of ordinary intelligence and prudence. See WIS J I—CIVIL 2401-02 (citing *Ohrmundt v. Spreghelhoff*, 175 Wis. 214, 184 N.W. 692 (1921)).

This case was tried to the court without a jury. This court may affirm a judgment if a review of the record demonstrates that the trial court reached a result the evidence would sustain if there were a specific finding. *Hochgurtel v. San Felippo*, 78 Wis.2d 70, 86, 253 N.W.2d 526, 532 (1977). The weight of testimony and the credibility of witnesses are questions for the trial court, and where more than one reasonable inference can be drawn from the credible evidence, the reviewing court must accept the one drawn by the trier of fact. *Hanz Trucking, Inc. v. Harris Bros.*, 29 Wis.2d 254, 262, 138 N.W.2d 238, 242 (1965).

Evidence was presented upon which the trial court could draw a reasonable factual inference that Giese did not actually believe and rely upon any representations by PES that it was shipping only nonhazardous waste. Although PES furnished Giese written manifests describing the materials as nonhazardous, the forms were those furnished by Giese at the outset, and PES merely continued to complete them as Giese had originally instructed. Significantly, a DNR employee testified that after the department's initial warning to Giese not to accept hazardous waste, Giese admitted that "he knew he took a hot load once in a while." Further, the DNR indicated that Giese did not comply with its March 1992 directive to develop a sampling and analysis program, and that he continued to operate without a storage facility license.

Giese did not test the products from his various large waste oil accounts although Giese's own experts acknowledged that these sources generate hazardous waste materials. Of the eight fifty-five-gallon drums found to contain hazardous waste, only one came from PES. A fact finder could reasonably conclude that Giese deliberately chose not to know the contents of the materials that he accepted from his accounts.

Giese points to the undisputed evidence that he returned five drums of gas waste to PES in November 1992 as evidence that PES had disregarded his verbal instructions not to submit gasoline waste after he verbally advised PES that he could no longer accept it. However, Berken testified that when he called Giese on behalf of PES to learn why the five drums were returned, Giese did not tell him that gasoline waste was no longer acceptable. Rather, Berken says Giese

told me that he returned the drums because there was too much gas in the drums He couldn't use that much gas in his process. He then told me in the future he would have to inspect the drums. ... [T]he drums that contained too much gas, he would leave on site

This statement, if believed by the trier of fact, is evidence that Giese believed PES would continue to ship some gasoline waste in violation of the law.

In conclusion, because Giese does not have a civil cause of action based upon statute, we do not address Giese's arguments relating to the trial court's finding that he failed to prove a causal connection between the statutory violation and the damages suffered. We similarly need not address the court's failure to compare the negligence of Giese and PES, because a comparison is relevant only if the underlying negligence claim is valid. Finally, because the court's finding that Giese did not prove reliance upon a misrepresentation is not a clearly erroneous finding, the judgment dismissing the third-party action is affirmed.

By the Court. -- Judgment affirmed.

This opinion will not be published. RULE 809.23(1)(b)5, STATS.